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N Chanthiran a/l Nagappan v Kao Che Jen

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(i)-54–09 OF 2021(Q)
MOHAMAD ZABIDIN CJ (MALAYA), NALLINI PATHMANATHAN AND RHODZARIAH BUJANG FCJJ
17 MAY 2023

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Companies and Corporations — Winding up — Liquidator — Whether leave of winding up court was required to commence proceedings against court-appointed liquidator in compulsory winding up — Whether Court of Appeal ('COA') wrongly held that leave was not required just because s 486(2) of Companies Act 2016 ('CA') did not expressly provide for leave — Whether COA erred in interpreting s 486(2) literally without considering context of Part IV of CA and Companies (Winding-Up) Rules 1972 — Whether liquidator's appointment, removal and performance of duties whilst in office and entire process of liquidation were all matters under strict supervision and control of winding up court — Whether it was abuse of process to commence proceedings against liquidator in court which did not deal with the winding up

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The sole issue in this appeal was whether leave of court was required to commence proceedings against a liquidator appointed by the court in a compulsory winding up. In this case, the respondent, a contributory and director of a wound up company, filed an action against the appellant, as the company's court-appointed liquidator, for various reliefs on the ground that he had failed to perform the duties expected of him. The appellant raised a preliminary objection ('PO') that the respondent had not obtained leave of the winding up court to commence the proceedings. The High Court upheld the PO but the decision was set aside by the Court of Appeal ('COA') which allowed the respondent's appeal and remitted the case back to the High Court to be heard on its merits. The COA held that s 486(2) of the Companies Act 2016 ('the CA 2016') (in pari materia with s 236(3) of the Companies Act 1965 ('the CA 1965')) did not expressly state that leave was required to commence the proceedings against the liquidator. In coming to its decision, the COA relied upon its reasoning in a previous decision in *Kao Che Jen v N Chanthiran a/l Nagappan* [2015] MLJU 2236 ('Kao Che Jen') where it held that a contributory did not require leave of court to apply under s 232(1) of the CA 1965 to remove a liquidator because s 232(1) did not make any mention of leave. In the instant case, the Federal Court granted the appellant leave to appeal against the COA's decision on the question whether leave of the winding up court was necessary to commence proceedings against a court-appointed liquidator in respect of the performance of his duties under Divisions 1 and 2

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of Part IV of the CA 2016. The appellant argued that it was a well-entrenched principle of law that leave of court was required to commence any proceedings against a court-appointed liquidator so that, inter alia, vexatious litigants were prevented from filing oppressive suits and interfering with the winding up process. On the other hand, the respondent argued that it was not the court's function to read words into s 486(2) of the CA 2016 and impose the requirement for leave when Parliament had not provided for it.

Held, unanimously answering the leave question in the affirmative and allowing the appeal:

(1) The COA's decision in the instant appeal was flawed as it accorded an overly simplistic and purely grammatical construction to s 486(2) of the CA 2016 to hold that the absence of the phrase 'leave of the court' in that section meant that leave was not necessary to proceed against a liquidator. The requirement for leave of the winding up court to be obtained before commencing such proceeding was in fact contained in the phrase 'subject to the control of the Court' in s 486(2) when considered in the context of Part IV of the CA 2016 and the Companies (Winding-Up) Rules 1972 (see para 66).

(2) The phrase 'subject to the control of the Court' in s 486(2) was equivalent to a requirement for leave of court to commence proceedings against the liquidator. This interpretation accorded with the common law position adopted in other jurisdictions. Similarly, s 277(2) of the CA 1965 (which was in pari materia with s 510(1) of the CA 2016), by requiring the court to enquire into any alleged misconduct by the liquidator, effectively imposed a requirement for leave of court to be obtained before any action was taken against the liquidator (see para 54).

(3) The phrase 'subject to the control of the Court' in s 486(2) essentially meant that a liquidator was answerable to the court in the performance of his duties. He was obligated to conduct the winding up process pursuant to the order granted by the winding up court. Once the liquidator was sanctioned by the court to perform his duties by virtue of his appointment, no party could interfere with him save with the permission of the winding up court. It would amount to an abuse of process if proceedings could be commenced against the liquidator before a different court when it was the winding up court that exercised supervision over the liquidator and the winding up process as a whole (see para 53).

(4) More significantly, the COA in the instant appeal had committed a fundamental error of law when it failed to follow the Federal Court's decision in *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713 which established that leave of the winding up court was required before proceedings were commenced against a court-appointed

liquidator. The COA was clearly bound under the doctrine of stare decisis to follow that pronouncement of the apex court (see paras 35 & 67).

(5) The COA erred in *Kao Che Jen* when it held that a contributory did not require leave of court to apply to remove a court-appointed liquidator under s 232(1) of the CA 1965 (in pari materia with s 482 of the CA 2016) because that section did not expressly provide for leave to be obtained. As in the instant appeal, in *Kao Che Jen* also, the COA had interpreted s 232(1) literally without considering that section together with ss 236(3) and 277(2) of the CA 1965 and r 63 of the Companies (Winding-Up) Rules 1972. If such a holistic construction had been adopted, the COA would have come to the inevitable conclusion that leave of the winding up court was necessary before an action to remove a liquidator was commenced (see paras 46, 56 & 63).

(6) The reasoning in *Kao Che Jen* was followed by the Court of Appeal when it decided *Shencourt Sdn Bhd (in liquidation) (in receivership) v Shencourt Properties Sdn Bhd (in liquidation)* [2019] 12 MLJ 184 and *Jagdis Singh a/l Banta Singh & Anor v Return 2 Green Sdn Bhd* [2020] MLJU 2193. Both these cases similarly erred in holding that s 482(b) of the CA 2016 (in pari materia with s 232(1) of the CA 1965) did not impose a requirement for leave of court to be obtained before an action to remove a liquidator was commenced (see para 64).

[Bahasa Malaysia summary

Isu tunggal dalam rayuan ini adalah sama ada kebenaran mahkamah diperlukan untuk memulakan prosiding terhadap penyelesai yang dilantik oleh mahkamah dalam penggulungan wajib. Dalam kes ini, responden, penyumbang dan pengarah syarikat yang digulung, memfailkan tindakan terhadap perayu, sebagai penyelesai syarikat yang dilantik oleh mahkamah, untuk pelbagai relif atas alasan bahawa beliau gagal melaksanakan tugas yang dijangkakan daripadanya. Perayu membangkitkan bantahan awal ('BA') bahawa responden tidak mendapat kebenaran mahkamah penggulungan untuk memulakan prosiding. Mahkamah Tinggi mengesahkan BA tetapi keputusan tersebut telah diketepikan oleh Mahkamah Rayuan ('MR') yang membenarkan rayuan responden dan mengembalikan semula kes tersebut ke Mahkamah Tinggi untuk didengar atas meritnya. MR memutuskan bahawa s 486(2) Akta Syarikat 2016 ('AS 2016') (yang pari materia dengan s 236(3) Akta Syarikat 1965 ('AS 1965')) tidak menyatakan dengan jelas bahawa kebenaran diperlukan untuk memulakan prosiding terhadap penyelesai. Dalam membuat keputusannya, MR bergantung kepada alasannya dalam keputusan sebelumnya dalam *Kao Che Jen v N Chanthiran a/l Nagappan* [2015] MLJU 2236 ('Kao Che Jen') di mana ia memutuskan bahawa penyumbang tidak memerlukan kebenaran mahkamah untuk memohon di bawah s 232(1) AS 1965 untuk memecat penyelesai kerana s 232(1) tidak menyebut apa-apa kebenaran. Dalam kes semasa, Mahkamah

Persekutuan membenarkan perayu kebenaran untuk merayu terhadap keputusan MR mengenai persoalan sama ada kebenaran mahkamah penggulungan adalah perlu untuk memulakan prosiding terhadap penyelesai yang dilantik oleh mahkamah berkenaan dengan pelaksanaan tugasnya di bawah Penggal 1 dan 2 Bahagian IV AS 2016. Perayu berhujah bahawa ia adalah prinsip undang-undang yang mantap bahawa kebenaran mahkamah diperlukan untuk memulakan apa-apa prosiding terhadap penyelesai yang dilantik oleh mahkamah supaya, antara lain, pihak pelitigasi telah dihalang daripada memfailkan saman yang menindas dan mengganggu proses penggulungan. Sebaliknya, responden berhujah bahawa ia bukan fungsi mahkamah untuk membaca perkataan ke dalam s 486(2) AS 2016 dan mengenakan keperluan kebenaran apabila Parlimen tidak memperuntukkannya.

Diputuskan, sebulat suara menjawab persoalan kebenaran secara afirmatif dan membenarkan rayuan:

(1) Keputusan MR dalam rayuan semasa adalah cacat kerana ia memberikan pembinaan yang terlalu ringkas dan pengenaan tatabahasa semata-mata kepada s 486(2) AS 2016 untuk memutuskan bahawa ketiadaan frasa 'kebenaran mahkamah' dalam seksyen tersebut bermakna kebenaran tidak diperlukan untuk diteruskan terhadap penyelesai. Keperluan untuk mendapatkan kebenaran mahkamah penggulungan sebelum memulakan prosiding tersebut sebenarnya terkandung dalam frasa 'tertakluk kepada kawalan Mahkamah' dalam s 486(2) apabila dipertimbangkan dalam konteks Bahagian IV AS 2016 dan Kaedah-Kaedah Syarikat (Penggulungan) 1972 (lihat perenggan 66).

(2) Frasa 'tertakluk kepada kawalan Mahkamah' dalam s 486(2) adalah bersamaan dengan keperluan untuk kebenaran mahkamah untuk memulakan prosiding terhadap penyelesai. Tafsiran ini selaras dengan kedudukan undang-undang am yang diterima pakai dalam bidang kuasa lain. Begitu juga, s 277(2) AS 1965 (yang pari materia dengan s 510(1) AS 2016), dengan menghendaki mahkamah menyiasat sebarang salah laku yang didakwa oleh penyelesai, secara berkesan mengenakan keperluan untuk kebenaran mahkamah untuk diperoleh sebelum sebarang tindakan diambil terhadap penyelesai (lihat perenggan 54).

(3) Frasa 'tertakluk kepada kawalan Mahkamah' dalam s 486(2) pada dasarnya bermaksud bahawa penyelesai bertanggungjawab kepada mahkamah dalam melaksanakan tugasnya. Beliau bertanggungjawab untuk menjalankan proses penggulungan menurut perintah yang diberikan oleh mahkamah penggulungan. Sebaik sahaja penyelesai dibenarkan oleh mahkamah untuk melaksanakan tugasnya berdasarkan pelantikannya, tiada pihak boleh mengganggunya kecuali dengan kebenaran mahkamah penggulungan. Ia akan menyamai

penyalahgunaan proses jika prosiding boleh dimulakan terhadap penyelesai di hadapan mahkamah yang berbeza apabila mahkamah penggulungan yang menjalankan pengawasan ke atas penyelesai dan proses penggulungan secara keseluruhan (lihat perenggan 53).

(4) Lebih ketara, MR dalam rayuan segera telah melakukan kesilapan asas undang-undang apabila ia gagal mengikut keputusan Mahkamah Persekutuan dalam *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713 yang menetapkan bahawa kebenaran mahkamah penggulungan diperlukan sebelum prosiding dimulakan terhadap penyelesai yang dilantik oleh mahkamah. MR jelas terikat di bawah doktrin stare decisis untuk mengikuti pernyataan mahkamah tertinggi (lihat perenggan 35 & 67).

(5) MR terkhilaf dalam *Kao Che Jen* apabila ia berpendapat bahawa penyumbang tidak memerlukan kebenaran mahkamah untuk memohon untuk mengeluarkan penyelesai yang dilantik oleh mahkamah di bawah s 232(1) AS 1965 (yang pari materia dengan s 482 AS 2016) kerana seksyen tersebut tidak secara nyata memperuntukkan kebenaran untuk diperolehi. Seperti dalam rayuan segera, dalam *Kao Che Jen* juga, COA telah mentafsir s 232(1) secara literal tanpa mengambil kira seksyen tersebut bersama-sama dengan ss 236(3) dan 277(2) AS 1965 dan k 63 Kaedah-kaedah (Penggulungan Syarikat) 1972. Jika pembinaan holistik sedemikian telah diterima pakai, MR akan membuat kesimpulan yang tidak dapat dielakkan bahawa kebenaran mahkamah penggulungan adalah perlu sebelum tindakan untuk mengeluarkan penyelesai dimulakan (lihat perenggan 46, 56 & 63).

(6) Alasan dalam *Kao Che Jen* diikuti oleh Mahkamah Rayuan apabila memutuskan *Shencourt Sdn Bhd (in liquidation) (in receivership) v Shencourt Properties Sdn Bhd (in liquidation)* [2019] 12 MLJ 184 dan*Jagdis Singh a/l Banta Singh & Anor v Return 2 Green Sdn Bhd* [2020] MLJU 2193. Kedua-dua kes ini juga terkhilaf dalam memutuskan s 482(b) AS 2016 (yang pari materia dengan s 232(1) AS 1965) tidak mengenakan keperluan untuk mendapatkan kebenaran mahkamah sebelum tindakan memecat penyelesai dimulakan (lihat perenggan 64).]

Cases referred to

Abric Project Management Sdn Bhd v Palmshine Palza Sdn Bhd & Anor [2007] 3 MLJ 571, HC (refd)

Bursa Malaysia Securities Bhd v Mohd Afrizan bin Husain [2022] 3 MLJ 450, FC (refd)

Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow [1995] 3 MLJ 204, CA (refd)

Chin Cheen Foh v Ong Tee Chew [2003] 3 MLJ 57, HC (refd)

Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293, FC (refd)

A *Jagdis Singh a/l Banta Singh & Anor v Return 2 Green Sdn Bhd* [2020] MLJU 2193, CA (refd)
KTM Transformers Sdn Bhd v N Chanthiran a/l Nagappan [2015] 5 MLJ 547; [2015] 1 LNS 530, CA (refd)
Kao Che Jen v N Chanthiran a/l Nagappan [2015] MLJU 2236; [2015] 9 CLJ
B 295, CA (refd)
Lloyd-Owen v Bull (1936) 4 DLR 273, PC (refd)
Mamone and another v Pantzer (2001) 36 ACSR 743, HC (refd)
Mosbert Berhad (in liquidation) v Stella D' Cruz [1985] 2 MLJ 446, SC (refd)
NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd [1987] 1 MLJ 39, SC (refd)
C *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713, FC (refd)
Sarawak Timber Industry Development Corporation v Borneo Pulp Plantation Sdn Bhd [2005] 2 MLJ 74, HC (refd)
See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [2010] 1 MLJ 547,
D HC (refd)
Shencourt Sdn Bhd (in liquidation) (in receivership) v Shencourt Properties Sdn Bhd (in liquidation) [2019] 12 MLJ 184, CA (refd)
Siromath Pty Ltd (No 3), Re (1991) 9 ACLC 1587, SC (refd)
Sydlow Pty Ltd (in liq) v TG Kotselas Pty Ltd, Kotselas & Hamilton (1996) 14
E ACLC 846, FC (refd)
TN Metal Industries Sdn Bhd & Ors v Ng Pyak Yeow [1996] 4 MLJ 567, HC (refd)
Tai Kwong Goldsmiths & Jewellers (under receivership) v Yap Kooi Hee & Ors [1995] 1 MLJ 1, SC (refd)
F *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721, FC (refd)
Tee Siew Kai (liquidators for Merger Acceptance Sdn Bhd (in liquidation)) v Machang Indah Development Sdn Bhd (in liquidation) (previously known as
G *Rakyat Corp Sdn Bhd)* [2020] 6 MLJ 168, FC (refd)
Woodsville Sdn Bhd v Tien Ik Enterprises Sdn Bhd & Ors [2009] 3 MLJ 191, CA (refd)
Yap Cheng Hai v Yap Cheng Hai Feng Shui Center of Excellence Sdn Bhd & Ors [2010] MLJU 1858, HC (folld)
H *Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd* [1992] 2 MLJ 233, SC (refd)

Legislation referred to

Companies (Winding-Up) Rules 1972 r 63
I Companies Act 1965 (repealed by Companies Act 2016) ss 181A, 218(1)(i), 232, 232(1), 236(3), 266, 226(3), 277(2), Part X
Companies Act 2016 ss 453(2), 482, 482(b), 486(2), 510(1), Part IV, Divisions 1, 2, 4
Interpretation Acts 1948 and 1967 s 17A

Joint Stock Companies Act 1856 [UK]
Joint Stock Companies Winding-Up Act 1848 [UK]

Appeal from: Civil Appeal No Q-02(IM)-2552–12 of 2018 (Court of Appeal, Putrajaya)

Alvin Chong Chee Vun (with Jonathan) (Idris, Alvin Chong & Partners Advocates) for the appellant.
Lim Heng Choo (with Analissa Lim) (Lim & Lim Advocates) for the respondent.

Nallini Pathmanathan FCJ:

INTRODUCTION

[1] The sole issue in this appeal is whether leave of court is required for the commencement of proceedings against a court-appointed liquidator.

[2] The long-established position in this jurisdiction is that leave is obtained from the winding up court prior to such commencement. However, in two recent decisions, namely *Kao Che Jen v N Chanthiran a/l Nagappan* [2015] MLJU 2236; [2015] 9 CLJ 295 ('Kao Che Jen') and the instant appeal, the Court of Appeal has departed from this long-established position. It is therefore incumbent upon this court to clarify the relevant legal principles in this regard.

BACKGROUND FACTS

[3] The respondent, Kao Che Jen is a contributory and director ('the contributory') of one STM Transformers Sdn Bhd ('the company'). On 9 May 2013, one Ong Jin Ek, another contributory of the company, filed a petition to wind up the company on just and equitable grounds pursuant to s 218(1)(i) of the Companies Act 1965 ('the 1965 Act'). The company was consequently wound up by the High Court in Kuching on 21 June 2013. The appellant, N Chanthiran a/l Nagappan was appointed as the company's liquidator ('the liquidator').

[4] Over the years, the contributory has initiated a series of proceedings against the liquidator seeking, among others, to remove the liquidator and to compel him to produce the company's documents and accounts. Having been unsuccessful in all of those proceedings, the contributory commenced another action against the liquidator in the Kuching High Court, which has culminated in the present appeal. However, the contributory did not obtain leave of court prior to commencing these proceedings and as stated earlier, this comprises the basis for the entire appeal.

A THE HIGH COURT

[5] The present appeal arose from an application by the contributory dated 6 April 2018, where the contributory claimed that the liquidator had failed to perform his duties and accordingly sought a court order to compel the liquidator to do the following:

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(a) to call a creditors' meeting within seven days of the court order;

(b) to invite all the company's creditors to submit their proofs of debt;

C (c) to disclose the name of the company's trust account, the name of the bank that maintains the said account, any payments into the said account and the collection of debts from a list of purported debtors;

(d) to show the steps taken by the liquidator in the liquidation process; and

D (e) to disclose all the expenses incurred in the liquidation process and the purpose of the said expenses.

[6] The liquidator raised a preliminary objection that the contributory had failed to obtain leave of the winding up court to commence the action. In response, the contributory contended that such leave was not required as the action was grounded on the liquidator's failure to discharge his duties and was not against the liquidator personally.

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F **[7]** The contributory's argument did not find favour with the High Court judge, who allowed the liquidator's preliminary objection relying on the Court of Appeal decision in *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204 ('Chi Liung Holdings'), which held that leave of court is required before an action can be commenced against a court-appointed liquidator. The High Court judge noted that the Court of Appeal in *Chi Liung Holdings* had referred to s 236(3) of the 1965 Act. This provision is in pari materia with s 486(2) of the Companies Act 2016 ('the 2016 Act'), which provides as follows:

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> 486 Powers of liquidator in winding up by Court
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> (2) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section is *subject to the control of the Court* and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers. (Emphasis added.)

I

THE COURT OF APPEAL

[8] Dissatisfied with the decision of the High Court, the contributory appealed to the Court of Appeal. The appeal was centred solely on the issue of

whether leave of the winding up court was required under s 486(2) of the 2016 Act for the contributory to commence proceedings against the liquidator. On 11 August 2020, the Court of Appeal unanimously allowed the appeal and remitted the matter back to the High Court to be heard on the merits.

[9] The Court of Appeal reasoned that its function is not to read words into a statute, but to give effect to every word in the statute. In support of this proposition, the Court of Appeal cited its previous decision in *Kao Che Jen*, which interestingly, as alluded to earlier, arose from another action initiated by the contributory to remove the liquidator. The Court of Appeal then went on to hold that s 486(2) of the 2016 Act does not stipulate that leave is required before any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of the powers conferred on a liquidator by the said section.

THE FEDERAL COURT

[10] On 9 September 2021, the liquidator was granted leave to appeal to the Federal Court on the following questions of law:

(1) whether the prior leave of the winding up court is required in order for legal proceedings to be commenced against a court-appointed liquidator in respect of matters transacted by the liquidator in the course of the liquidation under Divisions 1 and 2 of Part IV of the Companies Act 2016; and

(2) if the answer to question (1) is in the negative, whether such proceedings are to be brought in th e winding up court and/or within the winding up proceedings if, amongst others, an order against the liquidator in his official capacity is sought.

THE LIQUIDATOR'S SUBMISSIONS

[11] Learned counsel for the liquidator pointed out that there are presently two conflicting lines of authority on the issue of whether prior leave of the winding up court is required before proceedings can be commenced against a court — appointed liquidator. It was submitted that the Court of Appeal decisions in *Chi Liung Holdings*, *Woodsville Sdn Bhd v Tien Ik Enterprises Sdn Bhd & Ors* [2009] 3 MLJ 191 and *KTM Transformers Sdn Bhd v N Chanthiran a/l Nagappan* [2015] 5 MLJ 547; [2015] 1 LNS 530 have established the position that leave of court is required in order to commence proceedings against a liquidator, but that the Court of Appeal has departed from this well-settled position in two recent decisions, namely *Kao Che Jen* and the instant appeal.

[12] Learned counsel sought to distinguish *Kao Che Jen* from the instant appeal on the basis that the former involved an application by the contributory to remove the liquidator pursuant to s 232(1) of the 1965 Act (which is in pari materia with s 482 of the 2016 Act) and is therefore not applicable to the instant appeal which is premised on s 486(2) of the 2016 Act.

[13] It was further submitted that as a court-appointed liquidator is an officer of the court, leave should be obtained from the winding up court before proceedings are commenced against him in respect of the performance of his duties. Learned counsel for the liquidator argued that the Court of Appeal in the instant appeal erred in deciding that the absence of the word 'leave' in s 486(2) of the 2016 Act means that leave is not required to sue a liquidator. It was submitted that in so holding, the Court of Appeal in the instant appeal disregarded the long line of cases which have decided to the contrary. Counsel further submitted that a requirement for leave will prevent vexatious litigants from filing repeated legal actions against a liquidator and in turn allow him to focus on completing the liquidation process.

THE CONTRIBUTORY'S SUBMISSIONS

[14] Learned counsel for the contributory submitted that s 486(2) of the 2016 Act does not have any express words that require leave to be obtained before proceedings can be commenced against a liquidator. It was accordingly submitted that the court cannot read the words 'leave of the Court' into s 486(2) of the 2016 Act where there are no such words in that provision.

[15] Counsel drew a comparison between s 486(2) of the 2016 Act and 24 other provisions in the 2016 Act which expressly spell out a requirement for leave of court to be obtained. It was contended that the absence of a similarly express requirement in s 486(2) of the 2016 Act evidences Parliament's intention that no such leave is required for the commencement of proceedings against a liquidator.

[16] Learned counsel for the contributory further relied on *Kao Che Jen* and the Supreme Court decision in *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39 in arguing that the function of the court is confined to giving effect to the meaning of the words in s 486(2) of the 2016 Act and that the court is not entitled to import into the provision any requirement that is not found within that provision.

[17] It was further submitted that the Court of Appeal in *Chi Liung Holdings* erred in imposing a requirement for leave to be obtained before an action is brought against a liquidator as such requirement is not based on any express provision in s 236(3) of the 1965 Act (which is in *pari materia* with s 486(2) of

the 2016 Act), but is instead premised on the grounds that the liquidator is appointed by the court. Counsel submitted that this amounts to reading into s 236(3) of the 1965 Act an additional requirement of leave which is not contained in that provision.

ORIGINS OF THE OFFICE OF A LIQUIDATOR

[18] The emergence of the modern-day liquidator can be traced back to the United Kingdom's Joint Stock Companies Winding-Up Act 1848, which empowered the Master of the Court of Chancery to appoint the 'official manager' of a joint-stock company that had been wound up. The rule that a liquidator should act under the control and direction of the court originated from the position occupied by the official manager under this Act (see Daniel Tan, *On the Sharp Edge of Public Duty and Private Interests — The Liquidator's Duty to be Objective, Impartial and Independent* (Law Gazette, Law Society of Singapore, October 2009)).

[19] The role of the official manager was, however, short-lived. The official manager was replaced under the Joint Stock Companies Act 1856 by the liquidator who became the person entrusted with the task of winding up the affairs of a company (see Rabindra S Nathan, *Law and Practice of Corporate Insolvency in Malaysia* (Thomson Reuters Asia 2019) — Chapter 11 at para 11.001).

[20] The primary function of a liquidator is to realise the assets of the wound up company and pay the resulting proceeds to the general body of unsecured creditors (see: Hugh K Thomson, *A Practical View of the Receiver's Relationship with Other Office Holders — The Liquidator* (2000) 16(2) IL&P 74). In other words, a liquidator represents the entire class of unsecured creditors. It is therefore crucial for the court to ensure that a liquidator does not face unwarranted interference in the process of discharging his duties.

THE POSITION IN MALAYSIA

[21] *Chi Liung Holdings*, a decision of the Court of Appeal, established the principle that leave of the winding up court should be obtained before proceedings can be commenced against a liquidator. The primary basis of the court's reasoning is s 236(3) of the 1965 Act. That reasoning is that since the liquidator is appointed by the court and has the status of an officer of the court, leave of the court is necessary to proceed against him. This is what the court said:

> At our resumed hearing, we struck off this appeal as we agreed with the learned judge that the motion, as such, in the first place, required the leave of the court before it could be brought but not for the reason found by the judge. *Firstly, we read*

the powers of liquidator in s 236(3) of the Companies Act 1965 ('the Act'):

> *The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.*

We are of the view from the above provision, it is clear tat a liquidator having been appointed by the court, is an officer of the court. It goes without saying leave of the court is needed before an action is commenced against him and officers like him. (Emphasis added.)

[22] The Court of Appeal, in its reasoning, took note of the rationale in *Lloyd-Owen v Bull* (1936) 4 DLR 273 ('Lloyd-Owen'), which held that a judge in winding up is the custodian of the interests of every class affected by the liquidation. It is the liquidator's function to ensure that all assets of the company are brought into the winding up. However, in doing so, the liquidator is bound to ensure that there is no unnecessary usage of the assets and that no vexatious or oppressive actions are taken out in the company's name. The Court of Appeal in *Chi Liung Holdings* then laid down the test for granting leave to sue a liquidator, namely that the court should be satisfied as to the probable success of the proposed claim and that the proposed claim should not be vexatious or merely oppressive. This was necessary to ensure that no unnecessary or wasteful claim is initiated against the liquidator. In its reasoning, the Court of Appeal stated as follows:

> While we agree that the applicant may proceed against the liquidator, we are, however, firmly of the view the procedure is that *the applicant must have first obtained authority from the winding up judge before proceeding against the liquidator and not, as was done here, proceeded independently to prevent unnecessary and wasteful litigation. The approach the learned judge should take is as given in the Privy Council case of Lloyd-Owen v Bull cited above. As advised in that case, he has to obtain authority from a judge below who will act liberally but must satisfy himself as to the probable success of this application and he has to give an assurance to the sanctioning judge that his action is not vexatious or merely oppressive. The court, in exercising their supervision, will ensure that no wasteful litigation is brought against liquidators and the like.* Since the applicant had not obtained the authority to proceed, we struck off this appeal with no order as to costs. (Emphasis added.)

[23] It is clear from the foregoing that the basis for the requirement of leave when commencing proceedings against a liquidator stems primarily from the statutory provision in s 236(3) of the 1965 Act (and now in s 486(2) of the 2016 Act).

[24] The Court of Appeal decision in *Chi Liung Holdings* was followed in *TN Metal Industries Sdn Bhd & Ors v Ng Pyak Yeow* [1996] 4 MLJ 567 ('TN Metal Industries'), where the High Court similarly found that leave of the court should be obtained before commencing an action against a court-appointed

liquidator since he is an officer of the court. The High Court further held that a party seeking such leave should establish a strong prima facie case against the liquidator. In so holding, the court made the following observations in relation to the role and status of a liquidator:

> His task is an onerous one. He is charged with a number of statutory duties and he has a right to apply to court for directions and guidance. *He is an officer of the court. He is open to accusations of impropriety, unfairness, and any label that a disgruntled party might seek to level at him. He ought to be protected against such abuse unless there is sufficient prima facie evidence to support such allegations. If any dissatisfied litigant is allowed to merely raise some issue and insist that on such mere allegations he be given leave to bring an action against a liquidator, then the wheels of justice, which at the moment grind extremely slowly, will in such circumstances come to a halt. No one will venture towards this task. A liquidator will spend all his time defending every action filed against him. He will then have to have professional indemnity insurance cover to protect himself against multifarious actions. Costs will escalate and his fees will have to be fixed.* (Emphasis added.)

[25] The decisions in *Chi Liung Holdings* and *TN Metal Industries* as set out above were followed in *Chin Cheen Foh v Ong Tee Chew* [2003] 3 MLJ 57, where the High Court observed that:

> ... *As a court appointed provisional liquidator, the defendant is an officer of the court and the court will jealously protect him* ...
>
> ...
>
> In a nutshell, from these authorities it can rightly be said that *before bringing an action against the defendant who is an officer of the court by virtue of his position as a court appointed provisional l iquidator, the plaintiff should first obtain leave of the winding up court. In the context of the present case, leave was not obtained by the plaintiff before he proceeded to file the present civil suit against the defendant in the defendant's personal capacity. This was certainly wrong in procedure and this court would not condone such laxity.* (Emphasis added.)

[26] In *Sarawak Timber Industry Development Corporation v Borneo Pulp Plantation Sdn Bhd* [2005] 2 MLJ 74 ('Sarawak Timber Industry'), the High Court cited the Australian Federal Court case of *Sydlow Pty Ltd (in liq) v TG Kotselas Pty Ltd, Kotselas & Hamilton* (1996) 14 ACLC 846 ('Sydlow') and the decision of the Supreme Court of New South Wales in *Re Siromath Pty Ltd (No 3)* (1991) 9 ACLC 1587 ('Siromath'), which explained the rationale behind the requirement to obtain leave of the court before suing a liquidator. It was held as follows:

> 33 However it is equally clear that *the court will not allow the liquidator to be subjected to unnecessary litigation or for the winding up process to be wrongfully impeded. One way in which the court achieves this is by requiring the grant of leave before an action can be brought against a liquidator.* Thus in the Australian case of *Sydlow Pty Ltd (in liq) v TG Kotselas Pty Ltd, Kotselas & Hamilton* (1996) 14 ACLC 846 at p 852, it was held:

> *... the Court must protect the integrity of the winding up under its supervision and control, by taking appropriate steps to prevent any proceedings or conduct which will wrongfully impede that process. One way in which this can be carried out is to require the grant of leave by the Court in respect of any action against an official liquidator, so that the Court can satisfy itself that there is no wrongful interference with the process.*

34 And in another Australian case, *Re Siromath* (1991) 9 ACLC 1587 it was held:

> *The control by the Court over the circumstances in which, and the extent to which, its own officers are to be subjected to personal pecuniary liability in respect of their activities in the course of the performance of their official duties falls clearly within the concept of the protection by the court of its own process ...* (Emphasis added.)

[27] In short, the control by the court of any such action against the liquidator acts as a filter against vexatious, frivolous and improperly motivated proceedings.

[28] On the test for granting leave to commence proceedings against a liquidator, the High Court in *Sarawak Timber Industry* referred to its previous decision in *TN Metal Industries* and concurred with the reasoning therein that there should be more than a mere allegation against the liquidator. The High Court further held that when misfeasance proceedings are brought against the liquidator, the applicant should prove pecuniary loss to the wound up company.

[29] In *Abric Project Management Sdn Bhd v Palmshine Palza Sdn Bhd & Anor* [2007] 3 MLJ 571 ('Abric'), the High Court observed that a liquidator is expressly recognised as an officer of the court pursuant to r 63 of the Companies (Winding-Up) Rules 1972 ('the Winding-Up Rules'), which reads as follows:

> 63 Officers of Court
>
> All liquidators appointed by the Court shall be officers of the Court.

[30] Based on the above provision, the High Court in *Abric* emphasised that the court will not allow proceedings to be brought against its officer without leave of the court. It was held as follows:

> [24] Therefore in reality the action proposed by the applicant against the liquidator is in respect of the performance of his official duties. *The liquidator however is an officer of the court. Rule 63 of the Companies (Winding Up) Rules 1972 is clear on this point. The court will not permit its officer to be sued without investigation of the merits of the case. Thus leave of court is necessary before such an action can be commenced ...* (Emphasis added.)

[31] Furthermore, the High Court in *Abric* cited the same Australian cases

referred to in *Sarawak Timber Industry* and reiterated that a prospective litigant should demonstrate a prima facie case before leave to commence proceedings against a liquidator can be granted and that pecuniary loss to the company needs to be shown when misfeasance proceedings are brought against the liquidator. The High Court observed that:

> [28] *In ascertaining whether leave ought to be granted, the court has to satisfy itself that there is no wrongful interference in the liquidation process. The court will not allow the liquidator be subjected to unnecessary litigation or for a winding up process to be wrongfully impeded. One way in which the court achieves this is by requiring the grant of leave before an action can be brought against a liquidator. This was made clear in the Australian case of Sydlow Pty Ltd (in liq) v TG Kotselas Pty Ltd, Kotselas & Hamilton* (1996) 14 ACLC 846 at p 852 where it was held:
>
> > *... the court must protect the integrity of the winding up under its supervision and control, by taking appropriate steps to prevent any proceedings or conduct which will wrongly impede that process. One way in which this can be carried out is to require the grant of leave by the court in respect of any action against an official liquidator, so that the court can satisfy itself that there is no wrongful interference with the process.*
>
> [29] *The control by the court over the circumstances in which and the extent to which its own officers are to be subjected to personal liability in respect of their activities in the course of the performance of their official duties falls clearly within the concept of the protection by the court of its own process* (see: *Re Siromath* (1991) 9 ACLC 1587).
>
> [30] *Therefore, before leave could be granted, the court must be satisfied that there is sufficient prima facie evidence to support any allegation made against the liquidator.* The court finds support in the decision of the High Court in *TN Metal Industries Sdn Bhd & Ors v Ng Pyak Yeow* [1996] 4 MLJ 567 ...
>
> [31] In *Sarawak Timber Industry Development Corporation v Borneo Pulp Plantation Sdn Bhd* [2005] 2 MLJ 74, it was ruled that *when misfeasance proceedings are brought, it is necessary for the applicant not only prove his allegations but also necessitates him to prove pecuniary loss to the company.* (Emphasis added.)

[32] In *Woodsville Sdn Bhd v Tien Ik Enterprises Sdn Bhd & Ors* [2009] 3 MLJ 191 ('Woodsville'), the Court of Appeal reaffirmed its earlier decision in *Chi Liung Holdings* that leave of the winding up court is required before an action can be brought against a liquidator. The Court of Appeal also rejected the contention that leave of the winding up court is only required when the proposed action against a liquidator is filed before a different court. The Court of Appeal said:

> [18] We would agree with the submission of learned counsel for the liquidator. Upon perusing the authorities referred to earlier, *we are of the unanimous view that prior leave from the court is required before the appellant can make any application for leave under O 52 r 2 of the Rules as against the liquidator, he being an officer of the court.* It is clear that the appellant was not armed with such leave when he made the application against the liquidator.

A [19] As discussed earlier, learned counsel for the appellant in referring to I*n re Maidstone Palace of Varieties Limited*, argued that leave of the winding up court is required only when the proposed action against a liquidator is pursued in another court other than the winding up court. We do not agree with counsel's proposition. *Whether the purported action against the liquidator is in another court or the winding* B *up court is irrelevant.* ... (Emphasis added.)

[33] In *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [2010] 1 MLJ 547 ('See Teow Guan'), the High Court cited the decision of the Supreme Court of New South Wales in *Mamone and another v Pantzer* (2001) 36 ACSR C 743 ('Mamone'), which explained the twofold purpose underlying the requirement for leave to proceed against a liquidator, namely that the court has a duty to protect its officer from spurious and vexatious litigation as well as to prevent wrongful interference with the winding up process. The High Court further held that in granting leave to sue a liquidator, the court should be D satisfied that the proposed claim has sufficient merit and the court has the discretion to take into account a variety of factors, including the sufficiency of the evidence adduced and the likelihood of success of the proposed claim. The High Court held as follows:

E [6] What are the principles upon which leave is granted to commence legal action against a liquidator in the present context? The legal position was considered in *Mamone and another v Pantzer* (2001) 36 ACSR 743 *where Santow J held as follows:*

> ... *The applicable principles and their public purpose which underlie the requirement that a prospective litigant must obtain leave to sue a court appointed liquidator can be stated in the following propositions*:
>
> F (i) *The court will protect its officer from spurious or vexatious litigation*: *Re Siromath Pty Ltd* (No 3) (1991) 25 NSWLR 25 at p 29; *Re Magic Australia Pty Ltd (in liq)* (1992) 7 ACSR 742 at p 746; 10 ACLC 929 at p 932; and
>
> (ii) *The court will protect the integrity of the winding up process to ensure no* G *wrongful interference with that process*: *Sydlow Pty Ltd (in liq) v TG Kotselas Pty Ltd* (1996) 65 FCR 234 at p 241; 144 ALR 159 at p 165–6.
>
> *To those ends, a prospective litigant must, to obtain the necessary leave, demonstrate its claim has sufficient merit. What is sufficient is affected by the circumstances and timing in which that leave is sought. Moreover courts recognise that liquidators, like* H *administrators, often have to make decisions on the run; to expect perfection in those circumstances is unrealistic.* In *Sydlow* above, Tamberlin J stated at FCR 242; ALR 165:
>
> *The discretionary power of the court to grant leave must be exercised having regard to all the circumstances of the particular cases and bearing in mind the need to protect* I *the integrity of its process. ... there must be more than mere assertion. The court's discretion may be exercised on many grounds, including, but not limited to, the sufficiency of the evidence adduced, as to the prospects of success of the action on the application for leave* ...

[7] To summarise*, the court is bound to keep in mind its duty to protect the liquidator*

from spurious or vexatious litigation and to preclude unwarranted and wrongful interference with the winding up process in deciding on whether or not to grant leave. On the facts of any particular case, sufficient merits have to be shown … mere assertion is insufficient. The court is at liberty to take into account a variety of factors, including the sufficiency of the evidence adduced and the likelihood of success of the prospective suit. It is evident therefore that there must be a minimum or threshold level of evidence substantiating the claim of a breach of duty to warrant the grant of leave.

[8] And *locally in Abric Project Management Sdn Bhd v Palmshine Palza Sdn Bhd & Anor* [2007] 3 MLJ 571; [2007] 7 CLJ 516 *Ramly Ali J (now JCA) went further to hold that a prima facie case is required …*

[9] It is evident from the cases above that *the grant of leave cannot be merely cursory. It requires an analysis of the evidence put forward in support of the alleged breaches by the liquidator to ascertain whether such evidence is merely frivolous and vexatious and is in effect bare assertion, or whether it meets a threshold level which warrants categorisation as possessing sufficient merit. In deciding on this issue in any particular case, the court is entitled to take into account a multitude of circumstances and factors. A significant indicator will be pecuniary loss.* (Emphasis added.)

[34] In the landmark case of *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713 ('Ooi Woon Chee'), the Federal Court clarified the test for the granting of leave to commence proceedings against a liquidator. It was held that in order to successfully obtain such leave, a prospective litigant should demonstrate a *prima facie* case (see: *Abric* at p 581; *TN Metal Industries* and *Sarawak Timber Industry*). The court explained that the prima facie standard was imposed in order to protect the court's officer and the winding up process. The Federal Court also held that in applying the test of whether a prima facie case was made out, the court is compelled to evaluate the evidence led to determine whether such test is in fact met (see: *Mamone*). It was further held that pecuniary loss suffered by the wound up company should be shown (see: *Abric*). This is what the Federal Court stated:

[11] *For leave to be granted to proceed with the 505 Suit pecuniary loss must be shown, otherwise the action would be a waste of time and costs. On this point in the case of Abric Project Management Sdn Bhd v Palmshine Palza Sdn Bhd & Anor* [2007] 3 MLJ 571 at p 581; [2007] 7 CLJ 516 at p 532 it was held that *in an application for leave to commence proceedings for, inter alia, breach of duty against a liquidator, it is necessary to prove pecuniary loss to the company.*

…

[15] *In order to succeed for the granting of leave the majority contributories must also make out a prima facie case, a standard to protect the court's officer and the winding up process* (see the cases of *Abric Project Management Sdn Bhd v Palmshine Palza Sdn Bhd & Anor* [2007] 3 MLJ 571; [2007] 7 CLJ 516 *TN Metal Industries Sdn Bhd & Ors v Ng Pyak Yeow* [1996] 4 MLJ 567; [1995] 1 LNS 320 *and Sarawak Timber Industry Development Corporation v Borneo Pulp Plantation Sdn Bhd* [2005] 2 MLJ 74; [2004] 8 CLJ 584. *These cases show that in applying the test the court is compelled to evaluate the evidence led to determine whether the test is met* . In *Mamone and*

another v Pantzer (2001) 36 ACSR 743, it was held that *prospective litigant must, to obtain leave, demonstrate its claim has sufficient merit*. (Emphasis added.)

[35] In proceeding to set out the test for granting leave to commence proceedings against a liquidator, the Federal Court in *Ooi Woon Chee* has confirmed that such leave is in fact required. This pronouncement of the Federal Court, being the Apex Court, has established a principle of law in this jurisdiction to the effect that leave of the winding up court is required before proceedings can be commenced against a court-appointed liquidator.

[36] More recently, the law applicable to the grant of leave for the commencement of proceedings against a liquidator was considered by the Federal Court in *Tee Siew Kai (liquidators for Merger Acceptance Sdn Bhd (in liquidation)) v Machang Indah Development Sdn Bhd (in liquidation) (previously known as Rakyat Corp Sdn Bhd)* [2020] 6 MLJ 168 ('Tee Siew Kai'). This case concerned the issue of whether a party, that is neither a creditor nor a contributory of a wound up company, has the locus standi to seek leave to initiate an action against the liquidator of that company. In deciding this issue, the Federal Court discussed the rationale behind requiring prior leave of court to sue a liquidator and reiterated the test for the grant of such leave as set out in *Ooi Woon Chee*. The Federal Court has accordingly reaffirmed that leave of the winding up court is indeed required before proceedings can be commenced against a liquidator. The court observed as follows:

> [74] This brings into focus the secondary issue of when and how leave ought to be granted to proceed against a court appointed liquidator personally.
>
> [75] *It is apt at this juncture to consider the role of the winding up court in a liquidation.* For this we turn to the case of *Vernon Lloyd-Owen v Alfred E Bull & Ors* [1936] 1 DLR 433 where the Privy Council observed that:
>
> > *A Judge in winding up is the custodian of the interests of every class affected by the liquidation. It is his duty even if it be in a voluntary liquidation that opportunity offers to see to it that all assets of the company are brought into the winding up. In authorising proceedings, especially if they may or will involve some drain upon the assets, he must satisfy himself as to their probable success: where, as in the present case, they involve no possible charge on assets, he will nevertheless be careful to see that any action taken in the company's name under his authority is not vexatious or merely oppressive.*
>
> [76] *The underlying rationale behind requiring prior leave of court is to avoid wasteful litigation being conducted against liquidators and the like and to preclude unwarranted and wrongful interference with the winding up process*: *Chi Liung Holdings* at pp 209–210 (MLJ); p 17 (CLJ) and *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [2010] 1 MLJ 547 at para [7].
>
> [77] *The 'probable success' test mentioned above has been further refined by this court in Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713; [2012] 2 CLJ 501. *There this court undertook a consideration of the factual matrix of the case*

before concluding that no prima facie case had been made out. It was held that in order to succeed in an application for the grant of leave the party seeking such leave must make out a prima facie case (citing, inter alia, *Abric Project Management Sdn Bhd v Palmshine Palza Sdn Bhd & Anor* [2007] 3 MLJ 571 at p 581; [2007] 7 CLJ 516 at p 532, *TN Metal Industries Sdn Bhd & Ors v Ng Pyak Yeow* [1996] 4 MLJ 567; [1995] 1 LNS 320, and *Sarawak Timber Industry Development Corporation v Borneo Pulp Plantation Sdn Bhd* [2005] 2 MLJ 74; [2004] 8 CLJ 584).

[78] *More significantly, this court held that in applying the test of whether a prima facie case was made out, the court is compelled to evaluate the evidence led to determine whether such test is in fact met* (see *Mamone and another v Pantzer* (2001) 36 ACSR 743 where it was held that *the claim has to have sufficient merit*).

[79] *It was also held that pecuniary loss suffered by the company in liquidation ought to be shown* (citing *Abric*). (Emphasis added.)

[37] Based on the above authorities, the position adopted by the Malaysian courts thus far can be summarised as follows:

(a) a court-appointed liquidator is an officer of the court and therefore leave of the winding up court should be obtained before proceedings can be commenced against him. In this regard:

(i) in *Chi Liung Holdings* (at p 207), the Court of Appeal cited s 236(3) of the 1965 Act (which, as stated earlier, is in pari materia with s 486(2) of the 2016 Act) in support of its reasoning that a liquidator appointed by the court is an officer of the court; and

(ii) in *Abric* (at para [24]), the High Court referred to r 63 of the Winding-Up Rules, which expressly recognises a liquidator as an officer of the court;

(b) the rationale underlying the requirement that a prospective litigant should obtain leave to sue a court-appointed liquidator is twofold:

(i) the court will protect its officer from spurious or vexatious litigation; and

(ii) the court will protect the integrity of the winding up process to ensure no wrongful interference with that process;

(see: *Tee Siew Kai* at para [76] *Chi Liung Holdings* at p 210; *See Teow Guan* at paras [6]–[7]; *Abric* at paras [28]–[29], and *Sarawak Timber Industry* at paras [33]–[34]);

(c) leave of the winding up court is required regardless of whether the proposed action against a liquidator is filed before the winding up court or another court (see: *Woodsville* at para [19]);

(d) the test for granting leave to commence proceedings against a court-appointed liquidator was initially formulated in *Chi Liung Holdings* (at p 210), where the Court of Appeal held that the court

should be satisfied as to the probable success of the proposed claim and that the proposed claim should not be vexatious or merely oppressive. This test was further refined by the Federal Court in *Ooi Woon Chee* (at paras [10]–[15]), where it was held as follows:

(i) the party seeking leave to proceed against a liquidator should make out a *prima facie* case (see: *Abric* at p 581; *TN Metal Industries* and *Sarawak Timber Industry*). In applying the test of whether a prima facie case was made out, the court is compelled to evaluate the evidence led to determine whether such test is in fact met; and

(ii) pecuniary loss suffered by the wound up company should be shown (see: *Abric*).

THE COURT OF APPEAL DECISION IN *KAO CHE JEN*

[38] Notwithstanding the well-settled position as set out above, namely that leave of the winding up court should be obtained before proceedings can be commenced against a court-appointed liquidator, the Court of Appeal in the instant appeal adopted a diametrically opposite approach. As noted earlier, the Court of Appeal in the instant appeal arrived at its decision by relying on its previous decision in *Kao Che Jen*. It is therefore pertinent to examine the reasoning adopted by the Court of Appeal in *Kao Che Jen* in order to ascertain and comprehend the decision in that case, and in turn, the decision of the Court of Appeal in the instant appeal.

[39] As explained earlier, *Kao Che Jen* involved the same parties as in the present appeal. In *Kao Che Jen*, the contributory filed an application seeking to remove the liquidator premised on s 232(1) of the 1965 Act and to appoint the official receiver as the new liquidator. The Court of Appeal held that there was no requirement to obtain leave before commencing proceedings to remove the liquidator. The rationale for this conclusion can be found, inter alia, in paras 7, 27 and 28 of the judgment. In essence, the Court of Appeal held:

(a) a cursory reading of s 232(1) of the 1965 Act does not disclose, on the face of it, any requirement for leave as a prerequisite to any application to remove a liquidator;

(b) s 266 of the 1965 Act also does not have any such express provision that requires leave;

(c) therefore, the expressed legislative intent of the law shows that no such requirement is necessary and accordingly leave is not a condition precedent for the purposes of making an application for the removal of a liquidator in a winding up ordered by the court;

(d) at paras 27 and 28, the Court of Appeal held that s 232(1) of the 1965 Act was to be compared with s 226(3) of the 1965 Act which expressly

stipulates that leave of court is required before proceeding with or against a company which has been wound up;

(e) similarly, a comparison was drawn with s 181A of the 1965 Act which expressly requires leave of court before an action may be brought on behalf of a company by a complainant;

(f) consequently, the Court of Appeal concluded that if indeed leave is required for the removal of a liquidator, that would have been expressly stipulated as a necessity under s 232(1) of the 1965 Act;

(g) it is incorrect to construe a statute by reading words into a section which does not clearly contain those words;

(h) applying the rules of statutory construction, it was patently wrong for the judge of first instance to construe s 232(1) of the 1965 Act as stipulating a need for leave of court to be obtained prior to the removal of a liquidator; and

(i) accordingly, the Court of Appeal held that there is no requirement for leave prior to the initiation of an action or proceedings to remove a liquidator.

[40] For ease of reference, we reproduce s 232(1) of the 1965 Act, which provides as follows:

> Section 232 General provisions as to liquidators.
>
> (1) A liquidator appointed by the Court may resign or on cause shown be removed by the Court.

[41] We also reproduce s 266 of the 1965 Act, which reads as follows:

> Section 266 Removal of liquidator.
>
> The Court may, on cause shown, remove a liquidator and appoint another liquidator.

Sections 232(1) and 266 of the 1965 Act (in pari materia with ss 482 and 453(2) of the 2016 Act respectively).

[42] As noted above, s 232(1) falls within Subdivision (2) of Division 2 of the 1965 Act, which is entitled 'WINDING UP BY THE COURT'. Sections 217–226 relate to the application of winding up. Sections 227–240 of Subdivision (2) refer to liquidators. Section 232(1) of the 1965 Act therefore falls within the subdivision relating to liquidators. As stated above, s 232(1) of the 1965 Act is preceded by a heading 'General provisions as to liquidators'. Section 232(1) of the 1965 Act, as reproduced above, stipulates that a liquidator in a winding up by the court is appointed by the court and on cause shown, can be removed by the court. It also allows for the court-appointed

liquidator to resign. The rest of the provisions in s 232 of the 1965 Act relate to the remuneration of a liquidator and the ratification of his acts.

[43] Having perused the context within which s 232(1) of the 1965 Act is placed in the scheme of matters relating to liquidators in a winding up scenario who are appointed by the court, it appears that s 232(1) of the 1965 Act is a statutory provision conferring the power to appoint and remove liquidators on the court. Put another way, where there is a power of appointment, there generally should reside a power of removal. And this is statutorily embodied in s 232(1) of the 1965 Act. It vests the power of appointment and removal in the winding up court. It is evident even from s 232(1) of the 1965 Act itself that any removal of a court-appointed liquidator can only be done by the court and to that extent, requires the leave of court.

[44] In the context of the control of the winding up court over liquidators and the removal of liquidators, it is relevant in our view to take into account the provisions of Division 4 of the 1965 Act, which sets out statutory provisions which are applicable to every mode of winding up. Subdivision (1) contains general provisions applicable to both winding up by the court and voluntary winding up. Section 277(2) of the 1965 Act (which is in pari materia with s 510(1) of the 2016 Act) provides specifically for control of the court over liquidators:

> *Control of Court over liquidators*
>
> (2) *The Court shall take cognizance of the conduct of liquidators*, and if a liquidator does not faithfully perform his duties and observe the prescribed requirements or the requirements of the Court or *if any complaint is made to the Court by any creditor or contributory or by the Official Receiver in regard thereto, the Court shall inquire into the matter and take such action as it thinks fit*. (Emphasis added.)

[45] This subsection therefore statutorily recognises that it is the winding up court that retains control over liquidators and that any complaint by any creditor or contributory warrants an inquiry into the matter. It is clear from all these provisions that any application to remove a liquidator can only be undertaken by a court, that too the winding up court that appointed him as the liquidator in the first place. The single issue is therefore whether the court is to undertake a prima facie assessment of the significance of the complaint and then proceed to hear the matter in full, namely by the grant of leave, or whether the court is bound to undertake a full investigation into each and every complaint of contributories and creditors when a complaint is levelled against a liquidator. In both instances, the matter is before the winding up court. It is simply whether the requirement for leave as a first step or as an initial requirement is envisaged under these statutory provisions or not.

[46] The Court of Appeal in its decision in *Kao Che Jen* undertook a literal

reading of s 232(1) of the 1965 Act in determining that no such leave was required simply because there were no such express words to that effect. This brings to the fore the issue of the mode of statutory construction to be adopted when interpreting a statute.

[47] As we have stated earlier, the nub of the reasoning of the Court of Appeal in *Kao Che Jen* is that it is the duty of the court, when interpreting a statute, to construe it according to the intention of the legislature. To this end, it was held that the court must give effect to the legal meaning of a statute just as it reads where the law is plain, straightforward and unambiguous. The function of the court is limited to interpreting and giving effect to the words used by the legislature. The court is not entitled to read words into a statute unless clear reason for it is to be found in the statute itself, citing decisions of the Federal Court and the Supreme Court.

[48] The Court of Appeal observed that neither s 232(1) nor s 266 of the 1965 Act expressly imposes a requirement for leave as a prerequisite before any application to remove a liquidator can be commenced. It was accordingly held that the expressed legislative intent of the law plainly and logically shows that no such requirement is necessary.

[49] The Court of Appeal further justified its reasoning by comparing s 232(1) of the 1965 Act with s 226(3) of the 1965 Act, which expressly requires leave of court before an action or proceeding can be proceeded with or commenced against a company when a winding up order has been made or a provisional liquidator has been appointed, and s 181A of the 1965 Act, which imposes a similar requirement before a complainant may bring, intervene in or defend an action on behalf of a company. The Court of Appeal held that Parliament would have expressly provided in s 232(1) of the 1965 Act for leave to be obtained before an application to remove a liquidator can be commenced, as it did in ss 226(3) and 181A of the 1965 Act, if that is the legislative intent.

[50] However, with the greatest of respect, it is not tenable to draw an analogy between s 232(1) of the 1965 Act, which provides a power of appointment and removal to the court in relation to a *liquidator* in a compulsory winding up situation, with s 226(3) of the 1965 Act, which deals with the initiation of an action or continuation of proceedings against *the company in liquidation*. They are two completely disparate issues. The only similarity that may be gleaned is if the two statutory provisions are read in a literal and grammarian fashion. Similarly, s 181A of the 1965 Act deals with a statutory derivative action which again has no nexus with the appointment and removal of a liquidator in a winding up by the court. In order to comprehend the true intent of Parliament in relation to whether or not leave is required, it is necessary to construe ss 232(1) and 277(2) in the context of the purpose and

A object of the 1965 Act. This is borne out of s 17A of the Interpretation Acts 1948 and 1967 ('the Interpretation Acts').

[51] The winding up of a company is governed by Part X of the 1965 Act (which is now reflected in Part IV of the 2016 Act) and the Winding-Up Rules.
B The primary object of winding up a company is to collect and distribute the assets of the company *pari passu* amongst unsecured creditors after payment of preferential debts (see: *Mosbert Berhad (in liquidation) v Stella D' Cruz* [1985] 2 MLJ 446 at p 447). Thus, the predominant role of a liquidator is to safeguard
C the interests of the unsecured creditors.

[52] The winding up court maintains control and supervision over a liquidator to ensure that the winding up process is carried out in an orderly manner. This function of the winding up court is enshrined in s 236(3) of the
D 1965 Act, which stipulates as follows:

> 236 Powers of liquidator
>
> ...
>
> (3) The exercise by the liquidator of the powers conferred by this section shall be
E *subject to the control of the Court*, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers. (Emphasis added.)

[53] The phrase 'subject to the control of the Court' in s 236(3) of the 1965
F Act essentially means that a liquidator is answerable to the court in the performance of his duties. He is obligated to conduct the winding up process pursuant to the order granted by the winding up court. Once the liquidator is sanctioned to perform his duties by virtue of his appointment by the winding up court, no party can interfere with him save with the permission of the
G winding up court. It would amount to an abuse of process if proceedings can be commenced against the liquidator before a different court notwithstanding the supervision exercised by the winding up court over the liquidator and the winding up process as a whole.

H **[54]** Leave of court refers to the sanction and permission of the court. In seeking leave of court, a prospective litigant informs the court regarding a proposed step to be taken in a proceeding. Since a liquidator is subject to the control of the court as provided under ss 236(3) and 277(2) of the 1965 Act, the court should be advised in the event any action, including an application to
I remove the liquidator, is proposed to be initiated against the liquidator. In other words, the phrase 'subject to the control of the Court' in s 236(3) of the 1965 Act is equivalent to a requirement for leave of court to commence proceedings against th e liquidator. This interpretation of s 236(3) of the 1965 Act is in line with the common law position adopted in other jurisdictions.

Similarly, s 277(2) of the 1965 Act, by requiring the court to enquire into any alleged misconduct by the liquidator, effectively imposes a requirement for leave of court to be obtained prior to any action being taken against the liquidator.

[55] Furthermore, as set out earlier, a liquidator has the status of an officer of the court pursuant to r 63 of the Winding-Up Rules. It follows that the winding up court, having appointed the liquidator, has the sole authority to supervise, discipline and, if necessary, remove its officer. As such, leave of the winding up court should be obtained before commencing any proceedings against the liquidator.

[56] When s 232(1) of the 1965 Act is read together with ss 236(3) and 277(2) of the 1965 Act and r 63 of the Winding-Up Rules, the inevitable conclusion should be that leave of the winding up court is required before proceedings for the removal of a liquidator can be commenced. The Court of Appeal in *Kao Che Jen* ought to have taken such a holistic construction of the provisions of the 1965 Act and the Winding-Up Rules.

[57] When interpreting a statutory provision, the court must consider the purpose and object of the underlying statute. Section 17A of the Interpretation Acts states as follows:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

(See also: *Bursa Malaysia Securities Bhd v Mohd Afrizan bin Husain* [2022] 3 MLJ 450 ('Bursa Malaysia Securities'), and *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721.)

[58] Section 17A of the Interpretation Acts makes it clear that a statutory provision ought to be read in a contextual, as opposed to a purely textual manner (see: *Bursa Malaysia Securities* at para [51]). Unfortunately, however, the Court of Appeal in *Kao Che Jen* resorted to the latter approach when interpreting ss 232(1) and 266 of the 1965 Act. In interpreting these provisions, the Court of Appeal failed to consider the wider context of Part X of the 1965 Act and the Winding-Up Rules. Neither did the court undertake any analysis of the rationale behind the winding up process. Although the Court of Appeal justified its approach on the basis of giving effect to the legislative intent, that is precisely what the court failed to do by adopting a strictly grammatical reading of the relevant provisions. In *Bursa Malaysia*

Securities, the Federal Court observed as follows:

> [77] Regrettably neither the High Court nor the Court of Appeal undertook any sort of consideration of the purpose nor principles set out in the rules in order to ascertain the meaning to be accorded to the word ... This was explained on the basis that as there was no ambiguity there was no necessity to consider anything other than the express words used. This was understood to amount to a literal reading of the relevant rule falling for consideration. In so doing, the Court of Appeal misunderstood the function and purpose of the literal rule of statutory construction. *Reading the express words set out in a statute in vacuo, and without taking into consideration the context in which those words are utilised, does not amount to a literal approach to statutory interpretation. That is a grammatical application of the meaning of words. Section 17A of the Interpretation Acts requires that the purpose and object of an Act and other instruments made under an Act must be undertaken when construing a statute. As s 17A is a statutory provision, it must be complied with.* Therefore, both the High Court and the Court of Appeal, in failing to undertake this task as provided for in s 17A, committed an error of law. (Emphasis added.)

[59] Interestingly, the Court of Appeal in *Kao Che Jen* referred to the Supreme Court decisions in *Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd* [1992] 2 MLJ 233 and *Tai Kwong Goldsmiths & Jewellers (under receivership) v Yap Kooi Hee & Ors* [1995] 1 MLJ 1, which held that since receivers are appointed by the court and are thus officers of the court, leave of the court should be obtained to proceed against them. The Court of Appeal also referred to its previous decision in *Woodsville* and acknowledged the principle established therein that leave of the court is necessary to sue a liquidator by virtue of him being an officer of the court.

[60] Nonetheless, the Court of Appeal in *Kao Che Jen* distinguished the above cases on the grounds that each of those cases concerned proceedings brought against the liquidator or receiver personally for certain acts or in connection with the performance of their duties and accordingly did not involve any legislative provision equivalent to ss 232(1) or 266 of the 1965 Act. The Court of Appeal emphasised that the action before it was governed by ss 232(1) and 266 of the 1965 Act, neither of which specified leave as a prerequisite to an application for the removal of a liquidator.

[61] The above is, with respect, an artificial distinction devoid of merits. There is, in substance, nothing that differentiates an application to remove a liquidator from an action commenced in respect of the performance of his duties. Both are proceedings which will interfere with the functions of an officer of the court. The rationale behind imposing a requirement for leave before any proceedings can be brought against the liquidator is to protect him from spurious or vexatious litigation and to preclude unwarranted and wrongful interference with the wind ing up process. These reasons apply equally in the context of an action to remove the liquidator, where a

requirement to seek prior leave of the winding up court will protect the liquidator from having to defend himself against potentially frivolous applications for his removal, which will in turn allow him to focus on the task of administering the affairs of the wound up company for the ultimate benefit of the unsecured creditors.

[62] In our view, this court ought to adopt the reasoning in *Yap Cheng Hai v Yap Cheng Hai Feng Shui Center of Excellence Sdn Bhd & Ors* [2010] MLJU 1858 (which was found by the Court of Appeal in *Kao Che Jen* to have misconstrued s 232(1) of the 1965 Act). In finding that leave of the court ought to be sought before initiating an application to remove a liquidator, Mary Lim JC (now FCJ) held as follows:

> 10. ... Looking at the numerous provisions concerning the role, decisions, actions of the Liquidator, or any question arising in the course of the liquidation, *it is clear that the Court maintains an overall supervisory role in the liquidation of any company. The Court needs to be informed in the event that the officer appointed to attend to the liquidation of the company is not progressing as the officer should under the related law and in the given circumstances. It is serious business to launch any allegation leading to a removal of a liquidator. Hence, leave of the Court ought to be sought.* (Emphasis added.)

[63] In short, the decision of the Court of Appeal in *Kao Che Jen* was based on a literal construction of ss 232(1) and 266 of the 1965 Act. In this context, it must be pointed out that s 266 of the 1965 Act refers to liquidators in the context of a voluntary winding up and not a compulsory winding up. To that extent, the use of s 266 of the 1965 Act is in error.

[64] The reasoning in *Kao Che Jen* has since been followed in two subsequent Court of Appeal decisions, namely *Shencourt Sdn Bhd (in liquidation) (in receivership) v Shencourt Properties Sdn Bhd (in liquidation)* [2019] 12 MLJ 184 and *Jagdis Singh a/l Banta Singh & Anor v Return 2 Green Sdn Bhd* [2020] MLJU 2193. Both these cases similarly erred in holding that s 482(b) of the 2016 Act (which is in pari materia with s 232(1) of the 1965 Act) does not impose a requirement for leave of court to be obtained before an action for the removal of a liquidator can be commenced. This has added to the confusion in relation to this issue.

THE ERRORS IN THE JUDGMENT OF THE COURT OF APPEAL IN THE INSTANT APPEAL

[65] As stated earlier, the Court of Appeal in the instant appeal relied on *Kao Che Jen* in arriving at its finding that there is no requirement pursuant to s 486(2) of the 2016 Act (which is in *pari materia* with s 236(3) of the 1965 Act) for leave of court to be obtained before an action can be brought against a

liquidator. Section 486(2) of the 2016 Act is reproduced below for convenience:

> 486 Powers of liquidator in winding up by Court
>
> ...
>
> (2) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section is *subject to the control of the Court* and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers. (Emphasis added.)

[66] Put simply, the Court of Appeal in the instant appeal held that the absence of the phrase 'leave of the court' from s 486(2) of the 2016 Act means that leave is not necessary to proceed against a liquidator. This is, for the reasons that have been enunciated at length above, a purely grammatical reading of the words in s 486(2) of the 2016 Act. As explained earlier, the requirement for leave of the winding up court to be obtained before proceedings can be commenced against a liquidator is in fact contained within s 486(2) of the 2016 Act in the form of the phrase 'subject to the control of the Court'. The Court of Appeal in the instant appeal, however, accorded an overly simplistic interpretation to s 486(2) of the 2016 Act and failed to consider the provision in the context of Part IV of the 2016 Act and the Winding-Up Rules. In the circumstances, it is our view that the decision of the Court of Appeal in the instant appeal is flawed as it adopted the reasoning *in toto* of *Kao Che Jen*.

[67] More significantly, the decision of the Court of Appeal in the instant appeal did not make any reference to the Federal Court judgment in *Ooi Woon Chee*, which was premised on the principle that leave of the winding up court is required before the commencement of proceedings against a court-appointed liquidator. The Court of Appeal in the instant appeal was bound by the doctrine of stare decisis to follow this pronouncement from the apex court. In failing to do so, the Court of Appeal in the instant appeal has committed a fundamental error of law. The importance of adhering to the doctrine of stare decisis was explained by the Federal Court in *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293 as follows:

> [2] ... *It is axiomatic to state that the doctrine of stare decisis has become the cornerstone of the common law system practised in this country. It is fundamental to its existence and to the rule of law. It has attained the status of immutability.* In *Public Prosecutor v Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276, Chang Min Tat FCJ had occasion to restate the doctrine in words which are poignantly clear when he said (at p 277):
>
> > *It is ... necessary to reaffirm the doctrine of stare decisis which the Federal Court accepts unreservedly and which it expects the High Court and other inferior courts in a common law system such as ours to follow similarly.*
>
> [3] *Judicial hierarchy must be observed in the interests of finality and certainty in the law*

and for orderly development of legal rules as well as for the courts and lawyers to regulate their affairs. Failure to observe judicial precedents would create chaos and misapprehensions in the judicial system. This fact was certainly borne in mind by the Court of Appeal in *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557 wherein Gopal Sri Ram JCA said (at p 582):

> We may add that *it does not augur well for judicial discipline when a High Court judge treats the decision of the Supreme Court with little or no respect in disobedience to the well-entrenched doctrine of stare decisis. We trust that the occasion will never arise again when we have to remind High Court judges that they are bound by all judgments of this court and of the Federal Court and they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein.*

[4] *The observation is but a stark reminder to judges of the importance of adhering to the doctrine.* That observation, although made in the context of a peculiar factual setting, is, in my view, equally applicable to the particular situation in the instant case where the Court of Appeal has refused, for insufficient reasons, to follow and apply the 'real danger of bias' test for recusal enunciated by the Federal Court in Majlis Perbandaran Pulau Pinang and Mohamed Ezam. *Until such time when the Federal Court holds otherwise, this test must remain entrenched and binding on all inferior courts including the Court of Appeal. Certainty in the law must prevail.* (Emphasis added.)

THE QUESTIONS OF LAW

[68] For the foregoing reasons, we were unable to agree with the submissions of the contributory that no leave of court is required to remove a court-appointed liquidator appointed under a compulsory winding up regime.

[69] It follows that the questions of law are answered as follows:

(a) question 1:

Whether the prior leave of the winding up court is required in order for legal proceedings to be commenced against a court-appointed liquidator in respect of matters transacted by the liquidator in the course of the liquidation under Divisions 1 and 2 of Part IV of the Companies Act 2016.

Answer: Yes, leave is required.

(b) question 2:

If the answer to question (1) is in the negative, whether such proceedings are to be brought in the winding up court and/or within the winding up proceedings if, amongst others, an order against the liquidator in his official capacity is sought.

Answer: Since the answer to question (1) is yes, it is not necessary for the court to answer question (2).

[70] For the foregoing reasons, we allowed the appeal with costs of RM50,000 subject to allocator

Rhodzariah Bujang FCJ (delivering supporting judgment of the court):

[71] I am moved to write this very brief judgment in support of that prepared by my learned sister, Tan Sri Nallini Pathmanathan, FCJ not to add anything to the facts and the law which have been so clearly and ably elucidated by my learned sister but to explain why I had taken a contrary stand in this case to the one I that took in *Shencourts Sdn Bhd*'s case, cited in para 64 of my learned sister's judgment, which judgment was written by my learned brother, Datuk Hamid Sultan JCA.

[72] It behoves upon me to do this out of complete fairness to the respondent in this appeal and to better appreciate that contrary stand, I need to go back a little bit further in time when I was in the High Court. The parties in this case are fully aware that it was my decision that was reversed by the COA in *Kao Che Jen*'s case mentioned in para 2 of my learned sister's judgment where I held that leave of the court is required before an action can be commenced again a court-appointed liquidator and I had, therefore, struck out the originating summons (OS No KCH-28–13/5 of 2013) filed by the respondent here against the appellant. That reversal by the Court of Appeal was done, as clearly shown by the case citation number, before the hearing of *Shencourts Sdn Bhd*'s case. In view of that reversal, I believed then, that I should not maintain the same stand that I took in the High Court when I sat in the Court of Appeal in *Shencourts Sdn Bhd*'s case.

[73] Back to the present case, I would say, with the utmost of respect to the respondent, that I am grateful of this opportunity and am fortified to reiterate that same stand which I took in the High Court for all the reasons, as I stated earlier, which had been clearly elucidated by my learned sister in her judgment. In particular, I would like to emphasis, as observed by my learned sister in para 67 of her judgment that we had in *Shencourts Sdn Bhd*'s case, likewise omitted to consider *Ooi Woon Chee*'s case, which we should have done.

[74] I would end this judgment of mine with a fervent hope that the explanation above would assist the parties herein to appreciate the reason for the obvious dichotomy in the judicial stand which I took in the courts below on this longstanding issue regarding the requirement of obtaining leave of the court before filing any action against a court appointed liquidator.

Appeal allowed and leave question answered in the affirmative.

Reported by Ashok Kumar